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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 628

FISHER'S BLEND STATION INC., a corporation,
Appellant,

VS.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and THOMAS S. HEDGES and T. M. JENNER, members of said Commission,
Appellees.

APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

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APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

STATEMENT

This is an appeal from the judgment of the Supreme Court of the State of Washington (R. 39) rendered upon its decision (R. 24) [reported in 82 Wash. Dec. 123, 45 Pac. (2d) 942], holding that a statute of that state (Chapter 191 of the Laws of 1933) known as the Occupation Tax, which imposes upon Appellant a tax amounting to one per cent of Appellant's gross income from its business of radio broadcasting, was valid and, as applied to Appellant, is not repugnant to or in conflict with Section 8, Article I, of the Constitution of the United States—the Commerce Clause.

The Decision of the Court Below

The court below, conceding that the state had no power to and did not intend to tax interstate commerce or the gross receipts therefrom, ruled that Appellant was not engaged in interstate commerce but in intrastate commerce and was, therefore, subject to the tax.

The record consists of an agreed statement of facts, and the foregoing ruling of the court below, it is submitted, is without any support whatsoever in the record, as will be hereinafter shown.

The court below, at the outset of its opinion, ruled that radio broadcasting stations are engaged in interstate commerce. It said:

> *"It must be admitted that, in their activities, the waves which are intentionally released by broadcasting stations in the course of their business are, in their field of activities, essentially interstate and international."* (82 Wash. Dec. at p. 126, 45 Pac. (2d) at p. 943, R. 26).
>
> *"It must be conceded that, once the magnetic waves are released from a broadcasting station, they become an interstate and international activity, or energy, and in the present state of the art are, generally speaking, subject to no human control, save, of course, that they can be interfered with or blanketed by other and stronger waves released at strategic points."* (82 Wash. Dec. at p. 126, 45 Pac. (2d) at p. 944, R. 27).
>
> "It cannot be denied that radio broadcasting

[*Italics ours throughout the brief unless otherwise noted*]

is, in its sphere of activity, essentially interstate and international. It has been held in the cases above referred to, probably upon sound reason, *that the use by a person of his own station constitutes interstate commerce*, as does the setting up and operation of a receiving set." (82 Wash. Dec. at p. 136, 45 Pac. (2d) at p. 948, R. 35).

The Supreme Court of Washington, despite this finding, ruled that Appellant was not engaged in radio broadcasting but that it merely leased its stations to advertisers who did the broadcasting. It thus stated:

"The tax which appellants seek to collect is a direct burden upon the business of respondent only insofar as it derives an income from leasing its stations to others for compensation." (82 Wash. Dec. at p. 129, 45 Pac. (2d) at p. 945, R. 29).

"Insofar as the conduct of its business affairs by respondent is concerned, it is all purely intrastate. Its plants are entirely within the state of Washington; its contracts provide only for the use of its stations and the recognized facilities thereof, including their power to project electromagnetic waves. Respondent completes its contracts with its patrons when it turns over its stations to them or to their agents, and it is none of respondent's concern, as long as the stations function properly, where or by whom the waves or vibrations which it causes to be released are received and transmuted into sound." (82 Wash. Dec. at p. 137, 45 Pac. (2d) at p. 949, R. 36).

Upon this finding of fact, that Appellant was not engaged in broadcasting but in leasing its stations to others who broadcast, the Supreme Court of Washington premised its ruling that no federal right of Appellant had been denied. The court relied on such cases as *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, and *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 294 U. S. 83, citing them for the proposition that the owner of an interstate bridge, over which persons engaged in interstate commerce pass on the payment of a fee, is not itself engaged in interstate commerce. The Supreme Court of Washington concluded:

> "The surrounding ether may be likened to the bridge, and, while respondent does not lease the ether, it does *lease* a device which enables its patron to use the ether as a 'bridge' or medium of communication between the station and such receiving appliances as may be so attuned as to reproduce the message released through space." (82 Wash. Dec. at p. 134, 45 Pac. (2d) 947, R. 33).

Amazingly enough, however, the Supreme Court of Washington while ruling that Appellant was not engaged in broadcasting commercially, but in leasing its stations, at the same time had no difficulty in ruling that Appellant was subject to the tax imposed by Chapter 191, Laws 1933, Section 2 (2) (ed):

> "Upon every person engaging in or continuing within this state in the business of radio broadcasting; * * *."

In other words, the Supreme Court of Washington

made wholly inconsistent conclusions as to the nature of Appellant's business. On the one hand, it ruled that Appellant was not engaged in commercial radio broadcasting in determining whether Appellant was engaged in interstate commerce. Yet in the next breath, it reached the conclusion that Appellant was engaged in commercial radio broadcasting and, therefore, was subject to the tax imposed on those engaged in radio broadcasting.

The Statute

The pertinent sections are set forth in Appendix A, annexed hereto.

The preamble to Chapter 191, Laws of 1933 of the State of Washington states that it is an act "* * * imposing taxes upon the privilege of engaging in business activities."

Section 2 describes the business activities subject to the tax, which are segregated into five principal classifications: (1) extractive function, (2) manufacturing and producing function, (3) wholesaling and retailing, (4) retail distribution, (5) performing and rendering services.

Subdivision (2) levies

> "an annual tax or excise for the privilege of engaging in business activities * * * measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be * * *."

Section 2 (2) imposes a tax of varying percentages on gross income for the several kinds of business ac-

tivities comprising the five classifications; and subdivision (e) (ed) of Section 2 (2) provides that:

> "Upon every person engaging in or continuing within this state in the business of radio broadcasting; as to such persons the amount of the tax or excise shall be equal to the gross income of the business, multiplied by the rate of one per cent."

Section 3 provides that:

> "If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, *upon the condition that he shall pay* the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

Section 17 states that any person may be enjoined from engaging or continuing in any business until the tax is paid.

Section 23 makes it unlawful to fail or refuse to obtain a license or to fail or refuse to make a return or to make any false return and any person violating any of the provisions of this section is guilty of a gross misdemeanor punishable by imprisonment in the county jail for not more than one year, or by fine of not more than one thousand dollars or both.

Section 5 states that in computing the amount of

the tax, there shall be exempt from gross proceeds of sales or gross income so much thereof as is derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the Constitution or laws of the United States.

Section 21 directs that the monies collected under the Act shall be paid into the state school fund up to a certain amount and over that amount shall be deposited to the credit of the state's general fund.

Appellant

Appellant operates two radio stations, KOMO and KJR, located in Seattle, Washington. It owns KOMO and leases KJR. It operates said stations in the business of radio broadcasting pursuant to licenses issued to it by the Federal Radio Commission. (Copies of said licenses are to be found in the Transcript of Record herein at p. 14.)

Appellees

Appellees are members of the Tax Commission of the State of Washington which is vested with the administration of Chapter 191 of the Laws of 1933 of the State of Washington, and is empowered to supervise the making of returns provided for therein, and the assessment and collection of taxes and penalties imposed thereunder.

The Proceedings in the State Court

Appellant, as plaintiff, instituted injunction proceedings in August, 1933, against the Tax Commission of the State of Washington and against the two members of the Commission. The bill of complaint, as amended by a stipulation as to additional facts,

sets forth that Appellant, in the business of radio broadcasting, was engaged in interstate commerce and that the occupation tax, conditioning Appellant's exercise of the privilege of engaging in such commerce, and measured by its proceeds from such commerce, was repugnant to and in conflict with Section 8, Article I of the Constitution of the United States (R. 1 to 18).

Appellees' demurrer (R. 19) to the complaint, amended as aforesaid, was overruled (R. 22).

Thereafter, upon a stipulation of the parties, the cause was submitted to the trial court for final determination upon the allegations of the complaint, as amended, as an agreed statement of facts (R. 23). The trial court entered a decree permanently enjoining Appellees from enforcing the act against Appellant (R. 22).

The Supreme Court of the State of Washington reversed the trial court, sustained the validity of the Act, and entered its judgment on October 19, 1935, denying Appellant any relief and ordering dismissal of the action. One judge, the Chief Justice, dissented.

Facts

This case arises on an agreed statement of facts.

The Record herein thus establishes the following facts:

1. *The nature of radio broadcasting*: Radio broadcasting consists of the transmission of electro-magnetic waves through the connecting medium known as the ether to receiving instruments which detect the incoming radio waves and amplify them into

sound. These electro-magnetic waves are transmitted through the ether by stations which set them in motion by electricity. The waves move at the speed of light and, in the present state of the art of radio broadcasting, they cannot be confined within state lines (R. 4).

2. *Control of radio broadcasting by the Federal Radio Commission*: Congress, under the authority conferred upon it by Section 8, Article I of the Constitution of the United States, has assumed control of all communications by radio, acting through the Federal Radio Commission. The Federal Radio Commission has, for the purpose of radio broadcasts, divided the United States into five zones, the fifth of which embraces Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, California, Territory of Hawaii and Alaska. The Federal Radio Commission has assigned certain quotas limiting the radio frequency bands of stations and their power in each of the five zones (R. 4). The radio frequencies assigned to stations represent bands of wave length to be used only by certain designated stations in each zone. These radio frequency bands are of four types: Clear Channel, High Powered Regional, Regional and Local Frequencies (R. 5).

3. *Description of Clear Channel and Regional Channel Stations*: A clear channel station is one which has assigned to it a frequency band which no other station is to use at the same time and is designed and calculated for the effective transmission of radio broadcasting over the entire area of the United States.

A clear channel station is assigned sufficient power by the Federal Radio Commission to accomplish that end (R. 5).

A regional station is one which has assigned to it by the Federal Radio Commission a radio frequency band for the effective transmission of radio broadcasting over the entire area or zone in which it is located and it is assigned sufficient power so to do (R. 5).

4. *The business of Appellant*: Appellant, through its operation of Station KOMO, which it owns (R. 3), and Station KJR, which it leases (R. 3), is engaged in the business of radio broadcasting (R. 3). That is, it is engaged in the business of transmitting electro-magnetic waves, which cross state lines, through the ether to receiving sets. Appellant operates each of these stations pursuant to a license obtained from the Federal Radio Commission (R. 3). The Federal Radio Commission has assigned Station KJR as a clear channel station, and Station KOMO as a regional station (R. 5). As a consequence, Appellant through said stations broadcasts continually and effectively over the areas designated to be covered as above indicated, by clear channel and regional stations, and also over certain parts of the high seas adjacent thereto and certain parts of the Dominion of Canada, particularly the Province of British Columbia (R. 5, 6).

These broadcasts are thus heard by a large number of persons (the exact number being unknown to either Appellant or Appellees), many of whom reside outside the State of Washington, but a substantial

portion of whom are resident within the State of Washington (R. 21).

5. *Appellant's revenues*: Appellant's gross income is derived from payments made for the broadcasting of programs (the transmission of electro-magnetic waves) by those who desire to reach the listening public in the areas and territories above described, beyond the State of Washington (R. 7). This gross income comes in part from the National Broadcasting Company which transmits programs by wire from outside the State of Washington to Appellant's stations for broadcast, and from commercial advertisers who desire to have programs and advertising broadcast (R. 7, 21).

The complaint, as amended, the facts of which are admitted to be true, states with respect to Appellant's business and revenues:

> Appellant "*is engaged in the business of radio broadcasting.*" (R. 3).
>
> Stations KOMO and KJR " have been and now *are engaged in broadcasting commercially* in said manner * * *." (R. 5).
>
> "That Stations KOMO and KJR are links in a system of National and Pacific Coast broadcasting in that they *relay* the National and Pacific Coast broadcasts of the National Broadcasting Company * * *." (R. 6).
>
> Appellant's "gross income arises out of payments made by the National Broadcasting Company Inc. for the broadcasting of said National and Pacific Coast programs, in the manner hereinabove described, and payments made by commer-

cial advertisers, for programs originating at Stations KOMO and KJR and other stations situate in other states, such as KGW in Portland, Oregon, connected by wire with Stations KOMO or KJR, *who desire to reach the listening public in the areas and territories hereinabove described.*" (R. 7).

"That the plaintiff, in engaging in the business of radio broadcasting as herein described, sells time to its customers at a charge of so much per minute of the time consumed. Plaintiff is required by the regulations of the Federal Radio Commission to occupy all time allotted to it in broadcasting and *when not broadcasting for one of its customers*, as above described, is required to furnish broadcasting programs and does so in the following way:

"(a) By broadcasting a program emanating from its own studios.

"(b) By purchasing a program broadcast by one of the chain systems and brought to plaintiff's studios by wire. Such program is generally known as a sustaining program." (R. 20).

"That the revenues of the plaintiff arising from the business of radio broadcasting come from the following sources:

"(a) From the National Broadcasting Company or other chain broadcasting companies for the use of plaintiff's broadcasting facilities in broadcasting programs, including advertising, originating outside of the State of Washington

and transmitted to plaintiff's broadcasting station by wire.

"(b) From persons, firms or corporations for the use of plaintiff's broadcasting facilities in broadcasting programs, including advertising and announcements originating in plaintiff's studios or transmitted to plaintiff's studios, such programs and announcements being broadcast only by plaintiff's stations.

"(c) From persons, firms or corporations for use of plaintiff's broadcasting facilities in broadcasting programs, including advertising, which are simultaneously broadcast from plaintiff's stations and transmitted by wire to other radio stations located within the State of Washington, for broadcast from such stations.

"(d) Same as (c) except the word 'within' changed to 'without'." (R. 21).

SPECIFICATIONS OF ERRORS RELIED UPON

1. The Supreme Court of the State of Washington by its judgment erred in reversing the decree of the Superior Court for Thurston County which granted a permanent injunction to Appellant, and against Appellees, and adjudicated that the Occupation Tax Act (Chap. 191, Laws of 1933), the enforcement of which, against Appellant, was enjoined, contravenes and is repugnant to Section 8, Article I, (the Commerce Clause) of the Constitution of the United States in that as applied to Appellant it is a tax or excise upon the privilege of engaging or continuing to engage in

interstate and foreign commerce and amounts to a direct burden thereon.

2. The Supreme Court of the State of Washington erred in entering judgment in favor of Appellees denying Appellant any relief and dismissing the action and in failing to enter judgment that Appellant is entitled to the relief sued for, in that the enforcement against Appellant of the statute of the State of Washington sought to be enjoined, to wit, the Occupation Tax, contravenes and is repugnant to Section 8, Article I, the Commerce Clause, of the Constitution of the United States, in that said statute, so enforced, is a tax or excise upon the privilege of engaging or continuing to engage in interstate and foreign commerce and amounts to a direct burden thereon.

3. The Supreme Court of the State of Washington erred in holding that Appellant, in the conduct of its business of radio broadcasting, is engaged in intrastate and not interstate commerce for the reason that the record shows Appellant is engaged solely in interstate commerce, and such holding that Appellant is engaged in intrastate commerce has no basis in fact and is in direct conflict with the facts well pleaded in the record and admitted by stipulation of the parties.

4. The Supreme Court of the State of Washington erred in holding that Appellant leases or rents its facilities and "turns over" its stations for compensation to its patrons or their agents, for the reason that such holding has no basis in fact and is in direct conflict with the facts well pleaded in the record and admitted by written stipulation of the parties.

5. The Supreme Court of the State of Washington erred in holding that the Act in question as applied to Appellant does not affect interstate commerce except incidentally and that it does not constitute a burden thereon and in failing to hold that the enforcement of the Occupation Tax Act against Appellant constitutes a direct burden on interstate commerce, as defined by and in accordance with the decisions of the Supreme Court of the United States. (R. 39-41).

SUMMARY OF ARGUMENT

1. The facts presented in this record, agreed to by the parties, clearly demonstrate that Appellant is engaged in interstate and foreign commerce.

2. Appellant's gross income is derived from interstate commerce.

3. The conclusion of the state court that Appellant is not engaged in radio broadcasting, but leases its stations to advertisers who broadcast, finds absolutely no support in the record.

4. The conduct of local activities as incidental to Appellant's business of radio broadcasting will not sustain the court's holding that Appellant is engaged in intrastate commerce.

5. This Court will review and reverse the finding of the state court because such finding is without evidence in the record to support it, and because as a result of such finding a federal right of Appellant has been denied.

6. Chapter 191, Laws of 1933, of the State of Washington, as applied by the court below to Appel-

lant, is unconstitutional because it is imposed on gross receipts from interstate commerce.

7. Chapter 191, Laws of 1933, of the State of Washington, as applied by the court below to Appellant is repugnant to Section 8, Article I of the Constitution for the further reason that it attempts to condition Appellant's right to engage in its interstate commerce business of radio broadcasing, upon the payment of the occupation tax.

8. The cases cited by the court below to support its main theory are applicable only on the assumption that Appellant leases its stations. There being no support in the record for this assumption, these cases are not in point.

ARGUMENT

POINT I

The Facts Presented in This Record, Agreed to By the Parties, Clearly Demonstrate That Appellant Is Engaged in Interstate and Foreign Commerce.

Appellant, engaged in radio broadcasting, transmits electro-magnetic waves across state lines. Through KJR and KOMO, it transmits such waves continuously and effectively over a number of states, as well as the adjacent high seas and the Dominion of Canada (R. 5, 6). These waves, which cannot be confined within state lines, (R. 4) are detected and converted into sound by receiving sets both in and without the State of Washington, with the result that listeners both within and without the state receive the programs which Appellant transmits to them* (R. 21).

It is the fact of transmission across state and national boundaries which constitutes the test of interstate commerce. *Western Union Tel. Co. v. Spreight*, 254 U. S. 17. Thus, the transmission of waves across state lines and into foreign countries has time and time again been held to constitute interstate and foreign commerce by the cases dealing with radio broadcasting.

Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co., 289 U. S. 266, at p. 279;
Whitehurst v. Grimes, et al., 21 Fed. (2d) 787 (E. D. Ky.);

* The stipulated facts are quite in accord with the opinion of this court in *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, at p. 200.

WBT v. Poulnot, 46 Fed. (2d) 671 (E. D. So. Ca.);

United States v. American Bond & Mtg. Co., 31 Fed. (2d) 448 (N. D. Ill.);

American Bond & Mtg. Co. v. United States, 52 Fed. (2d) 318 (C. C. A. 7th), cert. denied 285 U. S. 538;

Technical Radio Laboratory v. Federal Radio Commission, 36 Fed. (2d) 111 (Ct. of App. D. C.);

Durham Life Ins. Co. v. Federal Radio Comm., 55 Fed. (2d) 537 (Ct. of App., D. C.);

Trinity Methodist Church, South v. Federal Radio Commission, 62 Fed. (2d) 850 (Ct. of App. D. C.), cert. denied 288 U. S. 599;

Duncan v. United States, 48 Fed. (2d) 128 (C.C.A. 9th), cert. denied 283 U. S. 863;

KFKB Broadcasting Association, Inc., v. Federal Radio Commission, 47 Fed. (2d) 670, 672 (Ct. of App., D. C.);

KVL Inc. v. Tax Commission of Washington, 12 Fed. Supp. 497 (D. Wash. 1935);

Van Dusen v. Dept. of Labor & Industries, 158 Wash. 414, 290 Pac. 803;

Contra:

City of Atlanta v. Ogelthorpe University, 178 Ga. 379, 173 S. E. 110.

This Court in *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.*, 289 U. S. 266, at p. 279, stated:

"No question is presented as to the power of the Congress, in its regulation of interstate com-

merce, to regulate radio communications. *No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities.* In view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses. The Commission has been set up as the licensing authority and invested with broad powers of distribution in order to secure a reasonable equality of opportunity in radio transmission and reception."

In *Station WBT, Inc. v. Poulnot*, 46 Fed. (2d) 671 (E. D. So. Ca.), in which a state tax on radio receiving sets was held unconstitutional, the Court said (p. 675):

"There can be no doubt that communications by radio constitute interstate commerce. It has been so held by numerous courts, and the decisions of the Supreme Court of the United States defining interstate commerce necessarily lead to that conclusion. (Citing cases)

"The plaintiff contends that all radio communication is necessarily interstate, and in the present state of the art, this appears to be correct. However, it is not inconceivable that radio communication may in the future be so perfected that it may be confined strictly intrastate; but we do not consider it necessary to make any ruling upon that point now. Certainly under the facts of the present case, the plaintiff, through its broadcasting plant, is engaged in interstate commerce."

Pantomimic Corp. v. *Malone*, 238 Fed. 135 (C. C. A. 2d.) also demonstrates by way of analogy that the transmission of electro-magnetic waves across state and national lines constitutes interstate and foreign commerce. In that case, the transmission of light rays from a machine in Canada to a machine in New York State was held to be foreign commerce which could be prohibited by Congress.

Again, it should be noted that the control exercised by the Federal Communications Commission over radio broadcasting under the Radio Act of 1927 (44 Stat. 1162, 47 U.S.C.A. section 81 *et seq.*) and the Communications Act of 1934 (47 Stat. 1064, 1089, 1091, 47 U.S.C.A. section 151 *et seq.*), which superseded the Radio Act of 1927, is predicated upon the premise that the transmission of electro-magnetic waves in radio broadcasting, necessarily across state lines, is interstate commerce. This is apparent from a reading of the provisions of those acts.

Sec. 1 of the Radio Act of 1927 (47 U.S.C.A. Sec. 81) thus provided:

> "REGULATION OF INTERSTATE AND FOREIGN RADIO COMMUNICATIONS; GRANT OF LICENSE. This act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corpora-

tions, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; * * * except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

The Communications Act of 1934 (47 U. S. C. A. Secs. 151 and 152) provides:

"Sec. 151. PURPOSES OF ACT; FEDERAL COMMUNICATIONS COMMISSION CREATED.

"For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. (June 19, 1934, c. 652, Sec. 1, 48 Stat. 1064.)"

"Sec. 152. APPLICATION OF CHAPTER.

"(a) The provisions of this chapter shall apply to all interstate and foreign communications by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regu-

lating of all radio stations as hereinafter provided; * * *."

Furthermore, federal control over the internal management of broadcasting, provided for by the Radio Act of 1927 and the Communications Act of 1934, would be without warrant or authority except for the fact that upon transmission the electro-magnetic waves passing through the ether necessarily cross state lines, and, therefore, constitute interstate commerce. Both these acts provide that all stations must operate in the public interest, necessity and convenience (47 U. S. C. A. sections 90, 307), must furnish equal opportunities for broadcast to candidates for public office (47 U. S. C. A. sections 98, 315), prohibits all stations from broadcasting lottery information (47 U. S. C. A. section 316) and prohibits the transmission of obscene, indecent or profane matter by means of radio communications (47 U. S. C. A. sections 109, 326). These regulations can be justified only because radio broadcasting is interstate commerce.

In conclusion, it need only be noted that the state court below ruled that the transmission of electro-magnetic waves across state lines constitutes interstate commerce and this ruling is binding on Appellees herein who have not appealed therefrom.

POINT II

Appellant's Gross Income Is Derived From Interstate Commerce.

This, too, is demonstrated by the Record. The Record shows that the revenue received by Appellant

consists of payments made to it for the broadcast of programs to the areas reached by its stations. It is stipulated that Appellant's "gross income arises out of payments made by the National Broadcasting Company Inc. for the broadcasting of said National and Pacific Coast programs, in the manner hereinabove described, and payments made by commercial advertisers, for programs originating at Stations KOMO and KJR and other stations situate in other states, such as KGW in Portland, Oregon, connected by wire with Stations KOMO or KJR, who desire to reach the listening public in the areas and territories hereinabove described" (R. 7). In other words, Appellant is paid for transmitting electro-magnetic waves throughout the areas beyond the State of Washington reached by its stations, which waves may be detected and amplified and converted into sound by any receiving set which may be tuned in throughout those areas.

So also it is stipulated that the "plaintiff (Appellant)* in engaging in the business of radio broadcasting as herein described, sells time to its customers at a charge of so much per minute of the time consumed. Plaintiff is required by the regulations of the Federal Radio Commission to occupy all time allotted to it in broadcasting and *when not broadcasting for one of its customers, as above described,* is required to furnish (sustaining) broadcasting programs * * *" (R. 20). The foregoing, particularly the italicized

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* Words in parentheses are ours throughout unless otherwise noted.

portion, shows that Appellant, not the customer, does the broadcasting, *i. e.*, transmits the electro-magnetic waves, and is paid therefor by its customer, which seeks to have itself advertised in the areas covered by Appellant's stations, at the rate of so much per minute.

Quite plainly, therefore, Appellant's gross income is derived from interstate commerce.

POINT III

The Conclusion of the State Court That Appellant Is Not Engaged in Radio Broadcasting But Leases Its Stations to Advertisers Who Broadcast, Finds Absolutely No Support In the Record.

Nowhere in the Record is it stated that Appellant leases or rents its stations to any one. Nowhere in the Record is it stated that its income is derived from the leasing or renting of its stations. Nowhere in the Record does it appear that Appellant at any time turns over its stations and their operation to advertisers to do the broadcasting, or that it contracts so to do.

Per contra, all the facts stipulated to show the nature of Appellant's activities and from what it derives its income, completely negative such findings. As to the nature of Appellant's activities and the source of its income, the facts are hereinbefore quoted under "Facts" paragraph 5. In the face of the facts there quoted, what possible warrant can there be for finding that Appellant does not broadcast and receive

its income therefrom, but leases its stations to advertisers, who on that theory would be the broadcasters?

True, the stipulation as to additional facts (R. 20), previously quoted in this brief, refers to payments made by National Broadcasting Company and other commercial advertisers as payments made "for the use of plaintiff's (Appellant's) broadcasting facilities." The word "use" in this sense connotes and is synonymous with "utilizing," or deriving the benefit of the operation of, Appellant's broadcasting apparatus. It would require a perversion and distortion of the English language to infer therefrom that Appellant leases or rents its stations. Certainly such an inference is contradicted by the language of the very paragraph in which the words occur. That paragraph begins as follows:

> "The revenues of the plaintiff (Appellant) arising from the business of radio broadcasting * * *"

This clearly indicates that Appellant derives its income because it broadcasts programs and not from leasing its stations.

So, too, the paragraph immediately preceding the one in which the word "use" is contained likewise clearly demonstrates that it is Appellant and not the customer who broadcasts. That paragraph states that Appellant broadcasts sustaining programs, "*when not broadcasting for one of its customers*" (R. 20). Other language in that same paragraph similarly indicates that it is Appellant which broadcasts for its customers. It thus states that "the plaintiff (Appellant) *in engaging in the business of radio broadcast-*

ing as herein described, sells time to its customers at a charge of so much per minute of the time consumed."

In short, all the stipulated facts bearing on the nature of Appellant's activities and the source of its income bear out the fact that Appellant is engaged in commercial broadcasting.

One might as well say that a shipper who "uses" the facilities of a railroad, or a telephone subscriber who "uses" a telephone, thereby leases or rents the railroad or telephone lines. Of course, that is not so.

It has been recognized by the courts that it is the owner of the station, and not the customer, who controls the instruments and transmits the electro-magnetic waves out over the ether, even though at times some advertiser or other person may be the one who speaks into the microphone. In *Coffey v. Midland Broadcasting Co.*, 8 Fed. Supp. 889 (W. D. Missouri, 1934), in discussing the liability of the owner of a broadcasting station for defamatory words spoken by a customer and broadcast by a station over the air, the District Court said:

> "The conclusion seems inescapable that the owner of the station is liable. It is he who broadcasted the defamation. He took the utterance of the speaker which came to him in the form of pulsations in the air. Those waves of air he changed into electrical impulses. Them he threw out upon the ether knowing they would be caught up by thousands and changed again into sound waves and into a human voice. He intended to do these things. But for what he has done the

victim of the defamation never would have been hurt."

Similarly, in *Remick & Company v. General Electric Company*, 16 Fed. (2d) 829 (S. D. N. Y. 1926), a copyright infringement case, Judge Thatcher said:

> "It is not enough to say that the broadcaster merely opens the window, and the orchestra does the rest. On the contrary, the acts of the broadcaster are found in the reactions of his instruments, constantly animated and controlled by himself, and those acts are quite as continuous and infinitely more complex than the playing of the selection by the members of the orchestra."

Finally, it should be noted that Appellant is forbidden by law to surrender control of its stations to others. The admitted facts are that Appellant operates both Stations KOMO and KJR by virtue of licenses issued to Appellant by the Federal Radio Commission. Appellant's license requires Appellant "to render such broadcasting service as will serve public interest, convenience or necessity, to the full extent of the privileges herein conferred" (R. 16, 18), and provides that the license shall not vest in licensee any right to operate the station, or any right in the use of the designated frequency, in any manner other than is authorized in the license (R. 16, 18). The license authorizes Appellant and no one else to broadcast by means of the apparatus described therein.

Under Section 1 of the Radio Act of 1927 (47 U. S. C. A., Sec. 81), Appellant is required to have a license for the operation of its stations. Section 11 (47 U. S. C. A. Sec. 91) requires the licensee to operate

the station in accordance with the terms of the license, and provides that neither the license nor the right granted thereunder shall be assigned in violation of the provisions of this Act. Section 12 (47 U. S. C. A. Sec. 92) states that the station license, the wave length authorized to be used by the licensee, and the rights granted by the license, shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of without the consent in writing of the licensing authority. Section 14 (47 U. S. C. A. Sec. 94) provides for the revocation of a station license for noncompliance with the Act, or for failure to observe any regulations of the licensing authority. Section 20 (47 U. S. C. A. Sec. 100) requires the actual operation of all transmitting apparatus in any radio station to be carried on only by a person holding an operator's license issued under the Act.

These provisions of the Radio Act of 1927 have been re-enacted by the Communications Act of 1934 (47 U. S. C. A. Sec. 151 *et seq.*), the administration of the latter named Act, however, now being in the Federal Communications Commission.

Section 20 of the Rules and Regulations of the Federal Radio Commission*, of which this Court will take judicial notice under the rule laid down in *Caha v. United States*, 152 U. S. 211, further provides that the transfer of a station license without the consent of the Commission shall be sufficient ground for the revoca-

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*The rules and regulations of the Federal Radio Commission remain substantially unchanged under the Federal Communications Commission. See Title 47 U. S. C. A., Sec. 604(a).

tion of the license or the denial of any application for its renewal.

The finding of the court below that Appellant's entire revenue results from its surrender of control of the operation of its broadcasting stations and that it has permitted their operation by others, would lead to the conclusion that Appellant has so conducted itself as to give cause for the forfeiture of its licenses. A lease confers exclusive possession and control to the lessee in exchange for the payment of rentals (see, *In Re Owl Drug Co.*, 12 F. Supp. 439, 442) and this would constitute a violation of the above cited provisions of the statute pursuant to which Appellant holds its licenses.

We submit that there is no warrant in this record for a finding that Appellant has acted in violation of law and afforded ground for the revocation of its licenses.

POINT IV

The Conduct of Local Activities As Incidental to Appellant's Business of Radio Broadcasting Will Not Sustain the Court's Holding That Appellant Is Engaged In Intrastate Commerce.

The state court referring to Appellant owning property within the State of Washington and entering into contracts with persons residing within the state, states that Appellant completes its contracts with its patrons by turning over its stations to them or their agents and that these activities, denominated Appellant's "business affairs", are all purely intrastate.

Insofar as owning property and making contracts by Appellant is concerned it might be said that such activities are local in nature. Such activities, however, are engaged in only as a preliminary and necessary incident to radio broadcasting. The tax in question is not upon property nor upon the privilege of making contracts. It is specifically denominated as a tax upon the privilege of engaging in the business of radio broadcasting.

Moreover the revenue received is not for owning property or entering into contracts. There is but one source of revenue, namely, the payments made for broadcasting. By analogy, if the court's reasoning is correct, a tax upon a railroad engaged exclusively in interstate commerce measured by its gross receipts from such commerce, would be valid because the railroad engages in the local activities of owning property in the state and making contracts for the carrying of freight or passengers. Manifestly, the railroad is only entitled to revenue for the act of transportation. Such a tax, as later pointed out, is invalid as pertaining to railroads. *Galveston H. & S. Ry. v. Texas*, 210 U. S. 217.

We submit that there is no valid legal distinction between radio broadcasting by Appellant and what the court denominates the "business activities" of Appellant. There is only one business—the broadcasting of radio programs for revenue over an interstate area. Until Appellant has actually broadcast for the customer, by the projection of electro-magnetic waves, Appellant is not entitled to receive the payments to be made for such broadcasting. Prior to that time any

activities of the Appellant, which the state court calls local, are simply preliminary and incidental to the ultimate service purchased, the actual broadcasting.

The distinction between local activities incidental to interstate commerce and the interstate commerce itself is illustrated in *Ozark Pipe Line Corporation v. Monier*, 266 U. S. 555, which involved the validity of an annual franchise tax measured by the amount of the corporation's capital, as applied to a foreign corporation operating a pipeline to carry crude oil in interstate commerce across the state. It appeared that the corporation maintained an office within the state where its accounts were kept and from which it purchased supplies, employed labor and entered into contracts. It also maintained pumping stations to accelerate the passage of oil, owned automobiles and other property used exclusively in the prosecution of its interstate business. The court held the tax invalid as a regulation of interstate commerce despite the contention that the pipeline company was engaged in local activities, in addition to being engaged in interstate commerce. The court pointed out that the corporation's local business was so connected with the interstate commerce as to render the tax a burden upon such commerce:

> "The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of

its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done, and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial, and extends to whatever is necessary to the complete enjoyment of the right protected."

POINT V

This Court Will Review and Reverse the Finding of the State Court Because Such Finding Is Without Evidence In the Record to Support It and Because As a Result of Such Finding a Federal Right of Appellant Has Been Denied.

Where, as in the case at bar, a federal right has been denied as a result of a finding in the state court shown by the Record to be without evidence to support it, this Court will review and reverse the finding and decision of the state court. This Court has so ruled on numerous occasions. Directly in point is *Truax v. Corrigan*, 257 U. S. 312. This Court there stated at p. 324:

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the Fourteenth Amendment, we are at as full liberty to consider them as was the State Supreme Court. *Mackay v. Dillon*, 4 How 431; *Dower v. Rich-*

ards, 151 U. S. 658, 667. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. *Bailey v. Alabama*, 219 U. S. 219, 238, 239; *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418; *Mugler v. Kansas*, 123 U. S. 623, 661; *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 432. In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern Ry. Co. v. Albers Commission Co.*, 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co. v Cedar Rapids*, 223 U. S. 655, 668, 669; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611. Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question, to analyze the facts. *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 593; *Jones National Bank v. Yates*, 240 U. S. 541, 552, 553. In view of

these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard."

To the same effect, see:

Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 591;

Hanover Ins. Co. v. Harding, 272 U. S. 494, 511;

First National Bank v. Hartford, 273 U. S. 548, 552.

POINT VI

Chapter 191, Laws of 1933, of the State of Washington As Applied By the Court Below to Appellant Is Unconstitutional Because It Is Imposed on Gross Receipts From Interstate Commerce.

As appears from the provisions thereof quoted above, Chapter 191, Laws 1933, of the State of Washington, imposes an excise tax on Appellant's gross receipts for the privilege of engaging in the business of radio broadcasting.

The statute levies an excise tax for the privilege of engaging in business, not a property tax. *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 Pac. (2d) 91. It is not a police or regulatory measure nor is it

an excise in exchange for any special facility furnished by the state. *Paramount Pictures Distributing Co. v. Henneford*, 74 Wash. Dec. 308, 51 Pac. (2d) 385 (Nov. 1935).

Chapter 191, Laws 1933, thus imposes a tax on Appellant's receipts from interstate commerce because as seen, Appellant's gross receipts are derived from its interstate commerce business, *i. e.*, radio broadcasting. Such an occupation tax, of course, imposes an undue burden on interstate commerce and is, therefore, repugnant to Section 8, Article I, of the Constitution of the United States. This Court has so held on numerous occasions. In *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, at p. 470, this Court said:

> "It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom."

Philadelphia & Southern Mail Steamship Co. v. Pennsylvania, 122 U. S. 326, is conclusive. There a state tax was imposed upon the gross receipts of a steamship company engaged exclusively in interstate commerce. In holding the tax invalid, this court stated (122 U. S. at p. 335, 336):

> "The question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress? The tax was levied directly upon the receipts derived by the company

from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. * * *

"If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you performed, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

This rule was reaffirmed and applied in *Galveston H. & S. Railway Co. v. Texas*, 210 U. S. 217, which declared unconstitutional a Texas statute imposing a tax on the gross receipts of railroads whose lines were wholly within the State of Texas. The lines connected, however, with other lines and a part of the taxpayer's gross revenue was derived from the carriage of passengers and freight coming from or

destined to points without the state. In holding that the tax on this portion of the business was unconstitutional, this Court said at p. 224:

> "In *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the State, when such receipts were derived from commerce between the States and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. * * *"

More recently the rule of constitutional law announced in the *Philadelphia & Southern Mail Steamship* case was applied in *New Jersey Bell Telephone Co. v. State Board of Taxes*, 280 U. S. 338, where it was said at p. 346:

> "But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a State may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

Crew Levick Co. v. Pennsylvania, 245 U. S. 292;

Galveston H. & S. Railway Co. v. Texas, 210 U. S. 217;

Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U. S. 136;

United States Glue Co. v. Oak Creek, 247 U. S. 321.

In *KVL Inc. v. Tax Commission of Washington*, 12 Fed. Supp. 497, a Washington tax statute identical with the one at bar, imposing an occupation tax on the gross receipts of a broadcasting station, was held by a statutory three-judge court to burden interstate commerce and an injunction against its enforcement was granted. The court expressly refused to follow the holding of the Washington Supreme Court in the instant case.

Under the authority of the cases above cited, the Occupation Tax of the State of Washington herein involved as applied to Appellant is clearly invalid.

POINT VII

Chapter 191, Laws 1933 of the State of Washington As Applied By the Court Below to Appellant Is Repugnant to Section 8, Article I of the Constitution for the Further Reason That It Attempts to Condition Appellant's Right to Engage In Its Interstate Commerce Business of Radio Broadcasting Upon the Payment of the Occupation Tax.

Chapter 191, Laws of 1933, as applied by the Supreme Court of the State of Washington, imposes upon Appellant the obligation either of paying the tax, or of withdrawing from its activities in radio broadcasting.* It provides (Sec. 3, ch. 191, Laws of 1933):

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*See brief of the Attorney General of the State of Washington in *Northern Pacific Railway v. State of Washington*, in the Supreme Court of the United States, October Term, 1935, No. 529, at page 57, where this is declared to be the effect of the Act.

> "If any person shall engage or continue in any business * * * for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business * * * for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such function."

Section 17 of ch. 191, Laws of 1933, further provides for the institution of injunction proceedings to restrain the continuance of any taxable business until the tax is paid.

If applicable to the Appellant, as the court below held it was, this statute plainly conditions Appellant's right to continue with its interstate commerce business upon the payment of a tax on its gross receipts from that business. In so doing, the statute as applied to Appellant conflicts with Section 8, Article I of the Constitution of the United States because, to use the language of this court in *Sprout v. City of South Bend*, 277 U. S. 163, at p. 171:

> "The privilege of engaging in such (interstate) commerce is one which a State cannot deny. * * * A State is equally inhibited from conditioning its exercises on the payment of an occupation tax."

The decision of this court in *Leloup v. Mobile*, 127 U. S. 640, likewise demonstrates the invalidity of the

statute here involved as applied to appellant. This court there said at page 648:

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

Other cases to the same effect as the foregoing are:

Brown v. Maryland, 12 Wheat. 419;

Pickard v. Pullman Southern Car Company, 117 U. S. 34;

Robbins v. Taxing District of Shelby County, 120 U. S. 489;

Crutcher v. Kentucky, 141 U. S. 47;

Barrett v. New York, 232 U. S. 14;

Bowman v. Continental Oil Co., 256 U. S. 642;

New Jersey Bell Telephone Co. v. State Board of Taxes & Assessments of the State of New Jersey, 280 U. S. 338;

Ozark Pipe Line Corporation v. Monier, 266 U. S. 555;

Cooney v. Mountain State Telephone & Telegraph Co., 294 U. S. 384 (1935).

POINT VIII

The Cases Cited By the Court Below to Support Its Main Theory Are Applicable Only on the Assumption That Appellant Leases Its Stations. There Being No Support In the Record for This Assumption, These Cases Are Not At All In Point.

The court below cited and relied principally upon *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, and *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 294 U. S. 83. These cases merely follow the well-established rule that a state excise tax on the right of either a domestic or foreign corporation to act in a corporate capacity within the state is valid.

The court below stated that these cases hold that the owner of an interstate bridge collecting tolls from persons using that bridge is not engaged in interstate commerce and argued that, if the owner of such a bridge who rents that facility to persons engaged in interstate commerce is not itself engaged in such commerce, the owner of a broadcasting station who rents to others the facilities of the station is not engaged in interstate commerce. The court below said:

> "The surrounding ether may be likened to the bridge and, while respondent does not lease the ether, it does lease a device which enables its patron to use the ether as a 'bridge' or medium of communication between the station and such receiving appliances as may be so attuned as to reproduce the message released through space." (R. 33).

This analogy fails. In the bridge cases, a distinction is made between the owner of the bridge, a piece of inert property, and the railroad company, shipper or traveler who actually engages in that movement across state boundaries which constitutes interstate commerce. No such distinction exists in the field of broadcasting. There is no bridge, either physical or substantial, which is merely maintained by the broadcasters and across which others cause messages to flow. The broadcasting station owner himself transmits the electro-magnetic wave. The broadcasting station owner himself imposes upon that wave the modulations which permit properly attuned receiving sets to reproduce the sounds created in the studio, or other place of performance. This active communication and dissemination of radio programs is the act of interstate commerce, and this act is carried on not by advertisers or sponsors, but by the broadcasting station owner himself under license and requirement so to do.

IT IS SUBMITTED THAT THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF WASHINGTON IS ERRONEOUS AND SHOULD BE REVERSED.

Respectfully submitted,

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APPENDIX "A"

Chapter 191, Session Laws of 1933.
Occupation Tax.

AN ACT relating to taxation; imposing taxes upon the privilege of engaging in business activities and providing for the ascertainment, assessment, collection and distribution thereof; providing for the administration and enforcement of this act; providing penalties; making appropriations; and declaring that this act shall take effect immediately.

* * * * * * * *

SECTION 1. For the purposes of this act unless otherwise required by the context:

* * * * * * * *

(4) The word "person" or the word "company," herein used interchangeably, shall mean and include any individual, firm, copartnership, joint venture, association, corporation, trust or any other group or company acting as a unit, whether mutual, cooperative or otherwise.

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(6) The term "gross income" means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without

any deduction on account of losses: *Provided*, The term "gross income" shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

(7) The word "business" shall include all activities engaged in with the object of gain, benefit or advantage either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in taxable in the class in which it falls.

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SEC. 2. (1) Business activities, for the purpose of this act, are hereby declared to consist of the five separate and distinct functions, to-wit:

(a) The extractive function;

(b) The manufacturing and/or producing function;

(c) The wholesaling and/or jobbing function;

(d) The function of retail distribution;

(e) The function of performing and rendering services.

The taxes hereinafter imposed shall apply to all business activities within the state and to each function thereof, whether carried on separately or in combinations of two or more functions.

(2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against

values, gross proceeds of sales, or gross income, as the case may be, as follows:

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SEC. 2(e)(ed). Upon every person engaging in or continuing within this state in the business of radio broadcasting; as to such persons the amount of the tax or excise shall be equal to the gross income of the business, multiplied by the rate of one per cent.

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SEC. 3. If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function.

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SEC. 5. In computing the amount of any tax imposed under subdivisions * * * (2)(e) * * * of section 2 of this act, there shall be excepted from gross proceeds of sales or gross income so much thereof as is derived from sales of tangible personal property shipped or transported to points outside of the State of Washington, from sales to the United States government, or to the State of Washington, their departments or institutions, or from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution

or laws of the United States, and so much thereof as is collected by the taxpayer as an excise upon motor vehicle fuel or as a similar excise.

SEC. 6. The taxes imposed hereunder shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrued. The taxpayer, on or before said fifteenth day of the month, shall make out a return, upon such forms and setting forth such information as the tax commission may require, showing his estimate of the amount of the tax for which he is liable for the preceding month, sign and transmit the same to the tax commission, together with a remittance for said amount in the form required by section 20 of this act. * * *

SEC. 7. On or before fifteen days after the end of the tax year, each person liable for the payment of a tax under the provisions of this act shall make a return setting forth the gross proceeds of sales and/or the gross income received and/or accrued during such tax year and such other information as the tax commission may require, compute the amount of tax chargeable against him for such tax year under the provisions of this act, deduct the amount of monthly or quarterly payments, as hereinbefore provided, and transmit the same to the tax commission together with a remittance, in the form required by section 20 of this act, covering the residue of the tax chargeable against him for such year. * * *

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SEC. 9. It shall be the duty of every person liable for any fee or tax imposed by this act to keep and

preserve, for a period of five years, suitable records of gross proceeds of sales and/or gross income and such other books or records of account as may be necessary to determine the amount of any tax for which he may be liable under the provisions of this act; and all such books, records and invoices shall be open for examination at any time by the commission or its duly authorized agent. Any person who shall fail to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceeding, the correctness of any assessment of taxes made by the tax commission and based upon any period for which such books, records and invoices have not been so kept and preserved.

SEC. 10. If any person shall fail or refuse to make any return required by this act, the tax commission shall proceed, in such manner as it may deem best, to obtain facts and information on which to base the assessment of the tax herein prescribed; and to this end the commission may by itself or its duly appointed agent make examination of the books, records and papers of any such person and may take evidence, on oath, of any person, relating to the subject of inquiry. The oath may be administered by any member of the commission or by any agent designated by it for that purpose.

As soon as the tax commission shall procure such facts and information as it is able to obtain upon which to base the assessment of any tax payable by any person who has failed or refused to make a return, the commission shall proceed to determine and assess the tax against such person but such action

shall not deprive such person from appealing to the superior court as hereinafter provided. To such tax the commission may add a penalty of ten per cent thereof for failure or refusal to make a return and likewise shall add a further penalty of one per cent per month of the amount of the tax for each thirty days or portion thereof from the date upon which the tax was due as provided by this act, and shall notify such taxpayer by mail of the total amount of such tax and added penalties and such total amount shall become due and shall be paid within ten days after the date of such notice.

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SEC. 13. All taxes imposed under the provisions of this act shall be paid in full before any action may be instituted in any court to contest all or any part of such tax. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty imposed by this act, or any part thereof, except upon the ground that the assessment thereof was in violation of the constitution of the United States or that of the State of Washington.

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SEC. 15. If any tax, increase or penalty imposed by this act or any portion of such tax, increase or penalty be not paid within fifteen days after the same shall become due, the tax commission shall issue a warrant under its official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county, or so much thereof

as may be necessary, for the payment of the amount of such warrant, together with a further penalty of one per cent of the amount of the tax as determined by the tax commission for each thirty days or portion thereof after the date of such warrant, plus the cost of executing said warrant, and return such warrant to the tax commission and pay to it the money collected by virtue thereof within sixty days after the receipt of such warrant.

The sheriff, within three days after the receipt of said warrant, shall file with the clerk of the superior court of his county a copy thereof, and thereupon the clerk shall enter in the judgment docket, the name of the taxpayer mentioned in the warrant and in appropriate columns the amount of the tax or portion thereof and any increases and penalties for which the warrant is issued and the date when such copy is filed, and thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the taxpayer against whom it is issued in the same manner as a judgment in a civil case duly docketed in the office of such clerk, and the sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of said superior court. The sheriff shall be entitled to the fees provided by law for his services in levying execution on a superior court judgment, which shall be added to the amount of such warrant. The proceeds received from any sale shall be credited upon the amount due under the warrant and when the final

amount due is received, together with interest, penalties and costs, the judgment docket shall show the claim for taxes to be satisfied and the clerk of the court shall so note upon the docket. Any surplus received from any sale of property shall be paid to the taxpayer. If the return on the warrant shall show that the same has not been satisfied in full, the amount of the deficiency shall remain in judgment against the taxpayer which may be collected in the same manner as the original amount of such warrant.

In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any agent of the commission authorized to collect income taxes or taxes under this act, and in the execution thereof such agent shall have all the powers conferred by law upon sheriffs, but shall not be entitled to any fee or compensation in excess of the actual expenses paid in the performance of such duty, which shall be added to the amount of such warrant.

SEC. 16. Any tax due and unpaid under this act and all increases and penalties thereon shall constitue a debt due the State of Washington and may be collected by court proceedings in the same manner as any other debt in like amount, which remedy shall be in addition to any and all other existing remedies.

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SEC. 17. Any person against whom a tax shall have been imposed as herein provided may be restrained and enjoined, upon the order of the tax commission by proceedings instituted by the attorney general in the name of the State of Washington in the

superior court of the county in which the taxpayer resides or in which he has his principal place of business, from engaging and/or continuing in any business for which a privilege tax is required by the provisions of this act, until such tax shall have been paid and/or until such person shall have complied with the provisions of this act.

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SEC. 19. Taxes imposed by this act shall be in addition to any and all other licenses, taxes and excises levied or imposed by the state or any municipal subdivision thereof.

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SEC. 21. The tax commission, on the next business day following the receipt of any payments under this act, shall transmit the same to the state treasurer, taking his receipt therefor. The state treasurer, upon receipt thereof, shall first deposit to the credit of the current state school suspense fund, which fund is hereby created, so much of any sums received as may be necessary to bring the total amount available in said fund to the sum of fifty thousand dollars ($50,000.00) and thereafter to maintain the said fund in said sum as a revolving fund for the payment of sums appropriated under sections 28, 29 and 29-A of this act and shall deposit the balance of all sums received to the credit of the current state school fund: *Provided*, That when the total sum deposited to the current state school fund, together with all other revenues credited to said fund, shall have reached the sum of twelve million five hundred thousand dollars ($12,500,000.00) in any year beginning on the first day

of April and ending on the 31st day of March of the succeeding year, then any surplus over and above said sum of twelve million five hundred thousand dollars ($12,500,000.00) received during such year shall be deposited to the credit of the state general fund.

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SEC. 23. It shall be unlawful for any person to fail or refuse to obtain the license, or to fail or refuse to make any return provided for in this act; or to make any false or fraudulent return or false statement in any return, with intent to defraud the state or evade the payment of any tax or any part thereof imposed by this act; or for any person to [illegible] abet another in any attempt to evade the payment of such tax or any part thereof; or for the president, vice-president, secretary, treasurer or other officer of any company to make or permit to be made for any company any false return, or any false statement in any return required by this act, with intent to evade payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commission or its duly appointed agent, as required by this act; or to fail or refuse to permit the inspection or appraisal of any property by the commission or its duly appointed agent; or to refuse to offer testimony or produce any record as required in this act. Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor and punishable in the manner provided by law. (By Sec. 2267 Rem. Rev. St. this punishment is: imprisonment in the county jail for not more than one year or by a fine

of not more than $1000.00 or both). In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent return, or any return containing any false or fraudulent statement with the intent aforesaid, shall be guilty of the offense of perjury in the second degree and, on conviction thereof, shall be punished in the manner provided by law; and any company for which a false return, or a return containing a false statement as aforesaid shall be made, shall be punished, upon conviction thereof, by a fine of not more than one thousand dollars ($1000.00). All penalties or punishments provided in this section shall be in addition to all other penalties provided in this act.

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